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No. 71-435

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN MICHAEL RYAN, PETITIONER

v.

CURTIS W. TARR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
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Washington, D.C. 20530.

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Petitioner brought a pre-induction civil suit in the United States District Court for the Eastern District of Missouri, seeking to enjoin his induction into the armed forces and to secure the reconstitution of his local draft board. He alleged that his order of induction was invalid because two members of his local board resided outside the area in which the board had jurisdiction,[1] one of the two having moved sometime

[1] 50 U.S.C. App. 460(b)(3) provides that "each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction." At the time petitioner appeared before his local board, the pertinent Selective Service regulation, 32 C.F.R. 1604.52(c),

after his appointment to another county. He also claimed that the board had erred in failing to consider his conscientious objector (I–O) claim and his fatherhood (III–A) claim, both of which were first raised after issuance of the order to report for induction.

The district court (Pet. App. A–11–A–16) dismissed the suit for lack of jurisdiction under Section 10(b)(3), 50 U.S.C. App. (Supp. V) 460(b)(3), and petitioner appealed. The court of appeals affirmed (Pet. App. A–1–A–9). It held first that the local board was a *de facto* board, and thus that its acts were valid and not subject to collateral attack. As for petitioner's challenge to his I–A classification, the court determined that pre-induction judicial review of the denial of exempt or deferred status was barred by Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3).[2]

Petitioner registered with Selective Service on September 14, 1961, and, after being granted several deferments not here relevant, he was classified I–A on March 4, 1969 (Pet. App. A–2). He requested and was granted a personal appearance to discuss with members of his local board the loss of

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(Rev. Jan. 1, 1970) also provided: "The members of local boards shall * * * if at all practicable, be residents of the area in which their local board has jurisdiction."

[2] That provision provides that: "* * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President except as a defense to a criminal prosecution instituted under section 12 of this Title [Section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction * * *."

a prior hardship (III–A) classification; following that meeting the board voted 2–1 to retain him in Class I–A. Petitioner then filed an administrative appeal, and, on June 30, 1969, the State Appeal Board, after considering the Selective Service file *de novo,* voted unanimously (3–0) to classify him I–A. That same day, the local board mailed to petitioner an order to report for induction on July 14, 1969 (Pet. App. A–19).

Thereafter, petitioner for the first time requested, and was mailed, the Special Form for Conscientious Objectors (SSS Form 150), which he completed and returned to the board on July 8, 1969; his induction was postponed. On September 12, 1969, he further submitted a doctor's certificate attesting to his wife's pregnancy (Pet. App. A–20), and asked for a fatherhood (III–A) deferment. Without considering either the conscientious objector claim or the fatherhood claim, the local board notified petitioner on October 22, 1969, that his reporting date had been rescheduled for November 7, 1969. On receiving this information, he instituted the present pre-induction civil suit on October 31, 1969.[3] The district court dismissed the complaint (Pet. App. A–11–A16), and the court of appeals affirmed (Pet. App. A–1–A–9).

1. Petitioner contends here, as he did below, that the fact that his local board was improperly con-

[3] Thereafter, but prior to the scheduled reporting date, the board notified petitioner, on November 5, 1969, that the new information submitted after the mailing of his induction notice did not warrant a reopening of his classification (Pet. App. A–3).

stituted under the then applicable county and area residency requirements (see n. 1 *supra*) is grounds for enjoining his induction in a pre-induction suit. The argument is premature.

a. Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3), bars petitioner's challenge to the board's "classification or processing" of his various claims for exemption or deferment until after he has responded to his order of induction. While this Court has recognized that preinduction judicial review may be available in a narrow category of cases, where it is necessary to reconcile a potential conflict between Section 10(b)(3) and other provisions of the Act mandating exemption or deferment (*Oestereich* v. *Selective Service Board*, 393 U.S. 233; *Breen* v. *Selective Service Board*, 396 U.S. 460),[4] this is not such a case. Neither the county (50 U.S.C. App. 460(b)(3)) nor the then applicable area (32 C.F.R. 1604.52(c)) residency requirements preclude a construction of Section 10(b)(3) that requires petitioner to raise his argument that the board was unlawfully constituted either in defense to a criminal prosecution after refusal of induction or in a habeas corpus proceeding after taking the symbolic step forward. See *Czepil* v. *Hershey*, 425 F. 2d 251,

[4] See the government's brief on the merits in *Fein* v. *Selective Service System Local Board No. 7*, No. 70-58, this Term, a copy of which is being furnished to petitioner's counsel. *Fein* presents the question of the proper interpretation of Section 10(b)(3) in the context of a pre-induction suit challenging certain Selective Service procedures as being unauthorized by statute and a denial of due process of law.

252 (C.A. 7), certiorari denied *sub nom. Czepil* v. *Tarr*, 400 U.S. 849; *Anderson* v. *Hershey*, 410 F. 2d 492, 496 n. 11 (C.A. 6).

b. Nor should petitioner be permitted to maintain an action in the nature of mandamus under 28 U.S.C. 1361,[5] purportedly seeking to compel these respondents to reconstitute the local board. It is well recognized that "judicial interference [under that provision] is not warranted * * * if the alleged irregularities are of such a nature as would not prevent a valid order ultimately issuing from the administrative agency." *Knoll Associates, Inc.* v. *Dixon*, 232 F. Supp. 283, 285 (S.D.N.Y.). As pointed out by the court below (Pet. App. A–5–A–9), such is the case here (see pp. 8–9 *infra*).

Moreover, none of the respondents named in this action is in a position to correct whatever defect there may be. No one of them is charged, by statute or otherwise, with the duty of appointing local board members.[6] Under the applicable statute (50 U.S.C. App. (Supp. V) 460(b)(3)), local board members are "appointed by the President from recommendations made by the respective governors * * *." Neither the President nor the governor is a defendant in this case, and the persons who are defendants have no power to

[5] The section provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

[6] Petitioner named the following officials as defendants: Director of Selective Service; Missouri State Director of Selective Service; and Members of Local Board No. 235.

make appointments. Accordingly, there is no basis for mandamus against these respondents to take action which they have no legal duty—or, indeed, ability—to perform. See *Czepil v. Hershey, supra;* and cf. *Hudgins* v. *Circuit Court of Chesapeake, Virginia,* 294 F. Supp. 258 (E.D. Va.); *Hill* v. *U.S. Board of Parole,* 257 F. Supp. 129 (M.D. Pa.).

At all events, an application of 28 U.S.C. 1361 would be particularly inappropriate in this case, since the mandamus relief which petitioner seeks—*i.e.,* reconstitution of his local board—has already been accomplished. In July 1970, the board member who had earlier moved to another county was transferred to the board which exercises jurisdiction in the county where he now lives, and a new member who resides in the county was appointed; it is agreed that petitioner's board is now properly constituted under the statute.[7]

2. Even assuming that the courts below had jurisdiction to hear the merits of petitioner's claim, his attack on the improper constitution of his local board provides no basis for enjoining induction.

a. As pointed out by the court below, the board member living outside of the proper county at the time that petitioner's claims were processed was a resident of the county at the time of his appoint-

[7] The area residency requirement under 32 C.F.R. 1604.52 (c) (Jan. 1, 1970) was repealed by executive order on September 2, 1970 (Executive Order 11555, 35 Fed. Reg. 14191), amending Paragraph (c) of Section 1604.52, leaving as the only residency requirement that members of the local boards reside in the county served by the board (50 U.S.C. App. (Supp. V) 460(b)(3)).

ment, and thus "held his office under color of authority derived from appointment" (Pet. App. A–4). As this Court observed in *Ex parte Ward,* 173 U.S. 452, 456: "[T]he title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." See *United States* v. *Collins,* 346 F. 2d 765 (C.A. 5), certiorari denied, 400 U.S. 919; *Jessen* v. *United States,* 242 F. 2d 213, 214–215 (C.A. 10).

Similarly, the failure of another board member to satisfy the then applicable "area residency" requirement is not sufficient to nullify action taken by the board. The regulatory provision that members reside in "the area in which their local board has jurisdiction" was by its terms not absolute, but rather turned on a determination of practicability; 32 C.F.R. 1604.-52(c) provided that local board members shall "if at all practicable, be residents of the area in which their local board has jurisdiction."

It has long been recognized that acts of draft boards, like those of malapportioned legislatures (cf. *Baker* v. *Carr,* 369 U.S. 186), "are acts of a de facto political authority," *Clay* v. *United States,* 397 F. 2d 901, 911 (C.A. 5), vacated on other grounds, *sub nom. Giordano* v. *United States,* 394 U.S. 310; *Sellers* v. *McNamara,* 398 F. 2d 893 (C.A. 5), certiorari denied, 395 U.S. 950. As such, they are valid despite irregularities in the composition of the board and are not subject to collateral attack. *Wright* v. *Ingold,* 445 F. 2d 109 (C.A. 7); *Collins* v. *United States, supra; Czepil* v.

Hershey, supra; cf. *Ex parte Ward,* 173 U.S. 452.[8]

b. Moreover, it is abundantly clear that petitioner is in no position to complain of the constitution of his local board on the facts of this case. Following his initial I–A classification by the local board on May 6, 1969, petitioner took an appeal to the State Appeal Board. After reviewing his file *de novo*, that board voted unanimously to classify him I–A on June 30, 1969. No challenge has been made to the procedures followed on appeal or to the composition of the State Appeal Board. Consequently whatever defect may have existed at the local board level was plainly cured on the administrative appeal. *Falbo* v. *United States,* 320 U.S. 549, 555 (Rutledge, J., concurring); *De-Remer* v. *United States,* 340 F. 2d 712, 719 (C.A. 8); *United States* v. *Jones,* 142 F. Supp. 806, 818 (E.D.S. C.), affirmed, 241 F. 2d 704 (C.A. 4); and see *United States* v. *Atherton,* 430 F. 2d 741, 744 (C.A. 9); *Landau* v. *Allen,* 424 F. 2d 668, 672 (C.A. 6).

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[8] Petitioner contends that there is a conflict among the circuits on this issue, citing *United States* v. *Cabbage,* 430 F. 2d 1037 (C.A. 6). In *Cabbage,* however, a criminal prosecution for refusal to report for induction, the Sixth Circuit declined to set aside an induction order on the ground that the local board was not properly constituted under 32 C.F.R. 1604.52(c). Since the order was invalidated on another ground, however, the court urged (without so ordering) that the board be reconstituted in accordance with the then existing area residency requirement, stating that Cabbage would not be subject to reclassification until this was done.

As for petitioner's post-induction-notice claims, they were never considered by the improperly constituted local board prior to commencement of this civil suit. Nor should they have been. On his claim for fatherhood (III-A) deferment, by the explicit terms of the then applicable regulation, 32 C.F.R. 1622.30(c)(3) (Rev. Jan. 1, 1970),[9] petitioner was entitled to no review by the local board because he had failed to submit a physician's certificate attesting to his wife's pregnancy "prior to the time the local board [mailed] him an order to report for induction * * *" (Pet. App. A–5–A–8). Similarly, the post-notice conscientious objector claim was foreclosed from board consideration. As this Court recently held in *Ehlert* v. *United States,* 402 U.S. 99, the appropriate forum for review of such claims is within the military after the registrant has submitted to induction. Since petitioner was not entitled to have these claims considered at all, the fact that the local board may at the time have been unlawfully constituted would not—even assuming *arguendo* the jurisdictional point—entitle petitioner to the injunctive relief he now seeks.

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[9] Executive Order No. 11527, April 23, 1970, 35 F.R. 6571, has terminated the availability of the III–A fatherhood deferment. This change, however, does not apply to persons, such as petitioner, who claim eligibility accruing prior to that date.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[10]

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

[10] In our view, this case is wholly different from *Fein*, *supra*, in that here petitioner is not entitled to exempt or deferred status as a matter of law. Moreover, his collateral challenge to the composition of the local board has been consistently rejected as a basis for setting aside action taken by the *de facto* administrative body. Accordingly, we see no need to delay disposition of this case pending the outcome of *Fein*.

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